CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM, 1828.

M'CALEP vs. *MAXWELL.*

Eastern Dist. *March*, 1828.

If the plaintiff be indulged with leave to perfect an irregular service, the bail will not thereby be precluded from availing himself of the irregularity.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The defendant, sued as bail, urged that the plaintiff was not entitled to recover, because no service of the petition and citation had been made in the French language. There was judgment against him, and he appealed.

The counsel for the appellee urges there was no irregularity in the service on the principal, and that, if there was, the bail cannot avail himself of it.

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The record shews that the petition and citation were served in the English language only that the principal pleaded this in abatement; and the court was of opinion that the service ought to be in the French language also, but that the plaintiff was still in time to complete the service, by supplying the defect by copies in that language. Judgment was given against the principal, and it does not appear that he appealed.

The time of service in the French language, bears the date of the 4th of September, 1824, and the bail bond that of the 13th of April preceding.

All these proceedings took place before the promulgation of the Code of Practice, while the law required service in the French languoge. The indulgence granted by the court to the plaintiff, in giving him time to perfect the service, ought not to prejudice the bail, who, perhaps, signed the bond, merely because he saw that the plea in abatement would avail, and to afford to the defendant the opportunity of availing himself of the irregularity in the service.

The plaintiff, it is true, obtained from the court below time to perfect the service, but

this ought not to prejudice the bail, who had not the opportunity of resisting the application, and therefore must not suffer by it.

This case resembles that of *Ryan* vs. *Bradley*, *Taylor* 77, in which the superior court of South-Carolina held that the bail was discharged, the nature of the action having been changed from *debt* to *case*. They held the bail could say with truth, *non in hæc, fœdera venimus*.

In the present case, the original defendant being arrested on the service of a petition and citation, in a manner not supported by law, had the right of taking advantage of this, and could do so without going to jail. His friend would willingly bail him, on being shewn that the suit must abate, on the illegality of the service being pleaded in abatement. If, afterwards, the plaintiff, on discovering this, procured time to perfect the service, the bail ought not to suffer, and, without his consent, be compelled to stand bound for the appearance of the defendant, on a process to the service of which no objection could be made.

It is therefore ordered, adjudged and decreed that the judgment of the district court

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be annulled, avoided, and reversed; and that our judgment be for the defendant, with costs in both courts.

Woodruff for the defendant.

VIALET vs. *LALANDE.*

The supreme court will not, without particular grounds, interfere with a verdict on matter of fact.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. This is an action in which the plaintiff claims damages for a breach of an agreement which he alleges the defendant entered into with him. The contract has been denied, and the amount of the damages disputed. Both depend on the weight which ought to be attached to the conflicting testimony given on the trial. Of this the jury were the judges, and there is nothing shewn to authorise us to set aside the verdict they rendered.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Preston for the plaintiff, *Davezac* for the defendant.

PLANTERS' BANK OF GEORGIA vs. *PROCTOR.* Eastern Dist. *March*, 1828.

APPEAL from the court of the first district.

The third possessor may appeal from a judgment against the mortgagor.

The mere endorser of a note secured by mortgage, cannot obtain an order of seizure and sale out of court.

MARTIN, J. delivered the opinion of the court. The plaintiffs having obtained a writ of seizure on sale against a plantation and slaves in the possession of Avart, on a mortgage granted by the defendant; Avart intervened, and obtained an appeal.

The plaintiffs and appellees filed the general answer, that there is no error in the judgment.

Their counsel attempted to controvert the right of the intervening party to appeal; but we think the general answer admits that the parties in court are properly so on the appeal.

The appellant has assigned several errors on the face of the record, the first of which has been deemed sufficient by this court. It is, that the plaintiffs are mere endorsers of the note, to secure the payment of which, the mortgage was granted, so they have no authentic act to establish their right, which rests merely on a matter *in pais.*

It is therefore ordered, adjudged and decreed, that the order for issuing the writ of seizure and sale, be annulled, avoided and revers-

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ed, and the writ set aside; the plaintiffs paying all costs.

PLANTERS' BANK OF GEORGIA *vs* PROCTOR.

Seghers for the plaintiffs, *Morse* for the defendants.

QUICK vs. *JOHNSON.*

The confession of the party cannot be divided, but the evidence resulting from it may be destroyed or weakened, in part or the whole, by other evidence.

APPEAL from the court of the parish and city of New-Orleans.

PORTER. J. delivered the opinion of the court. The plaintiff claims from the defendant the sum of $2423; $1500 of which is stated to be due, as the price of the interest in one-fourth of the steam boat Enterprize, sold him, and the balance for work and labor done by the plaintiff on board the said boat.

The defendant pleaded the general issue and set up a claim in reconvention. The cause, was submitted to a jury, who found a verdict n favor of the plaintiff for $1610 62 cents.—The court gave judgment conformably to the verdict, and the defendant appealed.

There was a bill of exceptions taken on the trial which it is unnecessary to examine, as it was admitted in argument, that the verdict of the jury was not affected by the evidence suffered to go to them.

The cause presents no question of law, except one which arises out of the particular species of proof relied on by the plaintiff to support his case. It consists, in part, of confessions made by the defendant of the purchase of the boat, and he contends, these confessions were accompanied with assertions which shew he had paid for her, or rather for the share in her which he purchased.

The rule contended for by the appellant is correct. Confessions must be taken together, but when extra judicial, as in this case, the weight of evidence by which they may be rebutted, depends on all the circumstances of the case, as disclosed by the testimony.

We have examined with attention the evidence, which is too long to be given here in detail, and we do not think the jury erred in the conclusion they drew from it.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Preston for the plaintiff, *Carleton* for the defendant.

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WINTER vs. *DONALDSONVILLE.*

If the petition contains sufficient matter to support the action, a continuance is improperly denied to the plaintiff [who swears the absent witness will prove all the facts alleged] on the ground of their incompetency.

APPEAL from the court of the second district.

PORTER, J. delivered the opinion of the court. The contest between the parties to this suit, arises out of a claim set up by the defendants, to tax a portion of the land which the plaintiff has inclosed within his plantation. They aver that it is a part of the town of Donaldsonville, and he contends it is without the incorporated limits. The judge who tried the cause in the court of the first instance, by his decree sustained the pretensions of the defendants, and the plaintiff appealed.

It appears that William Donaldson, in the year 1806, or 1807, being then owner of the land at the mouth of the La-Fourche, on which the town of Donaldsonville is now situated, had a survey made of the rural estate thus possessed by him, divided it into lots, squares, and streets, and deposited the plan in the office of the parish judge. Immediately after making this survey, he sold lots according to the designation given them in the plat, and it does not appear in evidence that any change was afterwards made by him in regard to this property, or that he even attempted to use it as a plantation.

In the year 1816, the undertakers of roads and levees obtained a judgment against Donaldson, and, in virtue of said judgment, caused to be seized and sold a portion of the land which had been previously laid off as the town of Donaldsonville. In the sale of the sheriff to Gilbert, under whom the defendant holds the property is described as follows: "one lot of twenty-two arpents, one lot of twenty arpents, and one of eight arpents, making in all fifty superficial arpents of land, more or less; bounded on the south side by lands belonging to Walker Gilbert, on the east by lands belonging to the widow Lessard, on the west by the bayou La-Fourche, and on the north by Claiborne street, according to the plan of the town of Donaldsonville." At the date of the sale, the land was covered with woods, and uninhabited, and a short time after Gilbert, the purchaser, inclosed nearly the whole of it, including, as well the streets as the lots, and it has remained in that situation up to the commencement of this action. Nor is it shewn the corporation have ever since assessed the said land as subject to the town taxes, or attempted to enforce the same, until they took these steps, which induced the plaintiff to ap-

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ply for the injunction by which this suit has been commenced.

The plaintiff and appellant has, in this court, made the following points:

1. That a private individual cannot, by his own act or authority, confer the privileges of a town on his land.
2. That plaintiff's land is not included within the chartered limits of the town of Donaldsonville.
3. That, if he were, he is not bound by it: the legislature cannot, without the owner's consent, or in the mode prescribed, affect the rights of private property.

In addition to the points filed, counsel have relied, in argument, on an alleged error of the judge below, in refusing a continuance; the application for which was bottomed on an affidavit of the plaintiff, that he expected to prove by a witness who was absent, "all the matters alleged in his petition; that the land in his possession was not within the incorporated limits of the town of Donaldsonville, and was sold in block and not in lots; that it had been inclosed as a plantation since 1819, and was so in 1823, when the town of Donaldsonville was incorporated." The court was of opinion

that all the facts set forth in the affidavit were irrslevant, except those in relation to the inclosure; and the counsel for the defendants having admitted the latter, no continuance could be granted.

It appears to us the court below erred, and that the continuance should have been granted. The plaintiff swore positi vely he expected to prove by the witness *all the facts* alleged in his petition. If he did, it is hard to come to the conclusion they were irrelevant, for it sets out matter sufficient to enable him to recover. The cause must, therefore, be remanded for a new trial.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed,—that the case be remanded for a new trial, and that the appellee pay the costs of the appeal.

Watts for the plaintiff, *Ripley* for the defendant.

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MOORE vs. *STOKES.*

When the only question is as to the weight the testimony is entitled to, the supreme court respects the conclusions of the jury.

APPEAL from the court of the eighth district.

PORTER, J. delivered the opinion of the court. This is an action of slander. The plaintiff alleges, the defendant spoke the following false, scandalous and malicious words of him: "Lawrence H. Moore has testified to a lie in open court, in April last, in a suit wherein I was plaintiff, and William Allen was defendant, and by God I'll kill him for it!"

The defendant denies he ever threatened to kill the plaintiff, but admits he spoke the other words charged in the petition, and avers they are true.

The case was submitted to a jury in the court below, who found a verdict in favor of the plaintiff for $250. The defendant made an unsuccessful attempt to obtain a new trial; and judgment being rendered in conformity with the verdict, he appealed.

The evidence is contradictory. The weight of it is, perhaps, with the defendant, if no attention was to be paid to the oath the plaintiff swore on the trial of the cause, in which it was alleged he committed perjury. But what is stated by a witness, is presumed to be stated

truly, until the contrary is shewn; and it requires stronger evidence to establish the falsehood of what he has said, than it would to prove the incorrectness of an assertion made without the solemnity of an oath. In this case the only witness who directly contradicts Moore, is Stewart, and though the others do state circumstances, tending rather to corroborate his testimony, than that given by the plaintiff, yet, what they state is not sufficiently strong to authorise us to depart from the rule we have so often recognized in relation to verdicts.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Ripley and *Conrad* for the plaintiff, *Christy* for the defendant.

DUNBAR vs. *SKILLMAN.*

APPEAL from the court of the third district.

Parol' evidence may be received, of the declaration of a redhibitory defect by the vendor.

MATTHEWS, J. delivered the opinion of the court. This suit is brought on a promissory note, which appears to have been given for the price of a slave, &c. The defendant pleads

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in avoidance of his obligation to pay the amount claimed, redhibitory vices in the slave, &c. The cause was submitted to a jury in the court below, who found a verdict in favor of the plaintiff, for six hundred dollars, with costs of suit; judgment was rendered in pursuance thereof, and the defendant appealed.

On the trial of the case in the court below, oral evidence was offered and received, to prove that the plaintiff, at, and before the sale, had represented to the defendant, that the slave which the latter was about to purchase, was addicted to the vices of which he now complains.

A bill of exceptions was taken to the legality of this species of testimony, as contravening the warranty contained in the act of sale.—This act, in the clause of warranty, is silent on the subject of redhibitory vices. The testimony received was properly admitted, in pursuance of the art. 2498 of the new code; and it proves fully, that a complete disclosure was made by the plaintiff, of the vices inherent in the slave, at the time of the bargain between him and the defendant.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

be affirmed, with costs in both courts, and ten per cent damages on account of the appeal being frivolous.

Ripley and *Conrad* for the plaintiff, *Watts* for the defendant.

TREMOULET vs. CENAS' HEIRS.

A sheriff, who has received money on an execution, cannot invoke the prescription of five years.

The delay of a demand during seven years, and the circumstance of the plaintiff having, since the debt accrued, made a cession of his goods, without including the debt in the schedule, are not evidence of payment.

APPEAL from the court of probates of the parish and city of New Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiff claims from the heirs of a late sheriff, a sum of money which came to that officer's hands on an execution which the present plaintiff had put into his hands. The pleas were prescription and payment.

There was judgment for the plaintiff, and the defendant appealed.

The case is perfectly similar to that of Delasize against the present defendants, determined in this court at June term, 1826, *vol.* 4, 508.

To support the plea of prescription, the old civil code, 481, art. 78, is relied on. By this article, the arrears of all sums of money, payable by the year, or *at shorter periods*, are

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prescribed by the lapse of five years. The counsel urges that as the sheriff was bound to pay the money claimed *immediately*, the money was payable at a shorter period than one one year; *ergo*, the prescription attaches. It is clear that this article of the code applies only to sums payable by annual, semi annual, quarterly, monthly, or daily rates; otherwise, it would apply to every debt at maturity.

The plea of payment is based on a presumption arising from two circumstances—the first is, that the money was received by the sheriff in 1809, and no claim appears to have been made till 1826; the second is, that in the meanwhile, the plaintiff offered a cession of his goods, and in the schedule annexed to the petition, no mention is made of the present claim.

To this it is urged that a plaintiff is not warned by the plea of payment, of the necessity of establishing a demand anterior to the petition, and that the plaintiff was ignorant of his right against the present defendants, believing that their ancestors were discharged by the payment made under an *ex-parte* order, and did not discover his error till after the decision of this court in Delasize's case.

We are of opinion that both pleas were correctly determined in favor of the plaintiff.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

DeArmas for the plaintiff, *Christy* for the defendant.

BAYON vs. *BAYON.*

A creditor by judgment, rendered after the repeal of the act of 1813, cannot resist the wife's claim to priority, on the ground that her marriage contract was not recorded.

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. The plaintiff, wife of the defendant, sued for a separation of goods, and claimed a sum of $2000, which she brought him, to be paid her as a privileged debt, and by preference to Abat & Rouzan, creditors by judgment, who have sued out and levied executions on the defendant's property. She made these creditors, and the sheriff who levied the executions, parties to the present suit, and obtained an order that the moneys made might be brought into court.

The district court decreed the separation, and that the plaintiffs should recover from the defendant the sum of $2000, but directed the plaintiffs in execution to be paid, and condemned her to the costs of her opposition. From this judgment she appealed.

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Her claim to a privilege was rejected on the ground that her contract of marriage was not recorded according to the provisions of the act of 1813, which was in force at the celebration of her marriage.

The judgments on which executions have issued and been levied, are posterior in date to the repeal of the act of 1813, which was approved by the governor on the 10th of April, 1824. The oldest judgment being of the 10th of November of the same year; at that period the rights of married women did not depend on the registry of their marriage contracts.—The plaintiff's mortgage was after the act, in full force, and must take the preference of all younger ones.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, so far as it directs the plaintiffs in execution, Abat & Rouzan, to be paid in preference to her, be annulled, avoided and reversed; and it is further ordered, that she be paid by preference to them out of the moneys in the hands of the sheriff, and that the said plaintiffs in execution pay costs in both courts.

Seghers for the plaintiff, *Denis* for the defendant.

HAGAN & AL. vs. *CLARK.*

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APPEAL from the court of the first district.

The creditor can put the debtor *in mo a*, in no other manner than by a suit, writing, notarial protest, or a demand proven by the testimony of two witnesses.

MATTHEWS, J. delivered the opinion of the court. This suit is brought on a promise to give merchandize to the amount of $800, for a note made by Eben Fiske, and endorsed by Hyde and Merrit, of which the plaintiffs were holders. The defendant resists their claim, on the ground that he has not been put *in mora*, by a tender to him of said note, and demand of merchandize. The cause was submitted to a jury in the court below, who found a verdict for the plaintiffs; and judgment being rendered in pursuance of said verdict, the defendant appealed.

In the course of the trial in the court below, the judge was required to instruct the jury that the proofs in the case would not authorise the plaintiffs to recover, according to 1905 *art. Lou. Code*, which he refused, and bill of exception was taken, &c.

Notwithstanding the numerous points made on the part of the appellant in this court, we believe that the decision of the cause rests solely on a proper construction of that article of our code. It provides that a debtor may be

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put in default, by the terms of the contract, by the act of the creditor, or by the operation of law. The second mode of placing an obligor *in mora*, has alone relation to the present case. This is done by a demand on the part of the obligee, evidenced either by commencement of a suit, writing, protest of a notary, or testimony of two witnesses, made at or after the term stipulated for the fulfilment of the obligation. The appellant agreed that he would receive the note above described, in payment for merchandize of any kind, which he then had on hand, or might have previous to the term at which said note would become due. This agreement was made on the 17th of February, 1827, and the note was dated on the 13th of the same month, having six months to run from date.

The testimony of two of the clerks of the appellees, shews thot they had each, at a different time, tendered the note to the defendant, and demanded merchandize from him to its amount, which he refused to deliver, on various pretexts. The present suit was commenced within the period limited for the performance of the contract by its stipulations, and the prayer of the petition is in the alternative,

either that the defendant be ordered to pay $800, or deliver to the plaintiffs merchandize to that amount. According to the article of the code on which the appellant relies, the commencement of this suit is sufficient to put him in default; and if he had been willing to comply with the stipulations of this agreement he might in his answer have demanded that the note should be delivered over to him. Whether the plaintiffs were bound to make a tender of the note in their petition, is a question which, in the present case, need not be settled; for it is in proof that it had previously been twice tendered to him, and as often refused, and a total unwillingness shewn on his part to discharge the obligation of the contract.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Carleton and *Locket* for the plaintiff, *Maybid* for the defendant.

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FOUCHER vs. *CARRABY & AL.*

APPEAL from the court of the first district.

District & parish courts are not incompetent to entertain suits against tutors, curators, and executors *ratione materiæ*.

MATTHEWS, J. delivered the opinion of the court. The petition in this suit comprises two distinct actions—one hypothecary, the other in nullity. The plaintiff states that she is creditor and legatee of B. Lafon, deceased; that she obtained a judgment against his executors in the court of probates, and is unable to obtain satisfaction on it, in consequence of the waste of the testator's estate and insolvency of his executors; and claims a right of tacit mortgage on a lot of ground, described in her petition as belonging to said succession, and now held and possessed by the defendant. She further alleges, that a sheriff's deed, under which they hold the property, is null and void, being consequent on a sale made in virtue of an execution issued on a judgment, which is absolutely void, on account of total want of jurisdiction in the court by which it was rendered. The defendants claim title to the lot in dispute under the sheriff's sale, &c. They obtained judgment in the court below, from which the plaintiff appealed.

The district court in rendering judgment has decided solely on the alleged nullity of the

title under which the defendants claim the disputed premises; and this decision not having been objected to by the counsel for the appellant, in consequence of being confined to this subject, and as the record contains no proof that the written evidence, under which the plaintiff claims her tacit mortgage, was registered according to the act of 1813, providing for such cases; the matter relating to nullity will alone be considered.

The evidence of the cause, (or so much thereof as the present investigrtion requires to be stated) shews that one Desessart, a legatee of B. Lafon, obtained judgment against the executors of the latter, in the district court, for the amount of his legacy, and caused that judgment to be executed by the proper officer, who seized and sold the lot now in dispute, as belonging to the succession of the testator. At this sale the defendants became the purchasers, paid the price, and took the sheriff's deed, &c.

While the suit of Desessarts *vs.* Lafon's executors, was pending before the district court, no plea to its jurisdiction was filed on their part; nor was any appeal taken from the final judgment therein rendered: but it is now

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attacked as being absolutely null and void *ab initio*, and all subsequent proceedings thereon, down to the act of sale made to the appellees.

We had occasion to examine the subject which the suit now under consideration presents, in the case of *Tabor* vs. *Johnson*, *vol.* 3, 674. The court then, after mature consideration, and under some apparent embarrassment, caused by former decisions, came to the conclusion that the courts of ordinary jurisdiction of the state, are not incompetent to entertain jurisdiction of suits against tutors, curators, and testamentary executors, in relation to the administration of successions, *ratione materio*; but rather *ratione personæ*. If the doctrine taught by that case be true, it follows as a necessary consequence, that judgments rendered by those tribunals, against estates held and administered as above stated, are not absolutely void; and that sales made in executing such judgments, give titles to purchasers. So far from changing our opinion relative to the principles established by the decision of the case referred to, further reflection has fully confirmed us in a belief of their correctness.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be affirmed, with costs.

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Hennen for the plaintiff, *Seghers & Denis* for the defendant.

CLAMAGERAN vs. *BANKS & AL.*

APPEAL from the court of the parish and city of New-Orleans.

An abandonment rightfully made, reverts back to the time of the loss.

PORTER. J. delivered the opinion of the court. The correctness of the judgment rendered in the court below, between the plaintiff and defendants, is not complained of, but the garnishees aver that there is an error in it, so far as it condemns them to the payment of moneys which are in their hands.

In answer to the interrogatories propounded to them, they stated that they had no knowledge of the defendants, but that they had insured, on the 7th May, 1825, the schooner Samuel Smith for $ 2500, and her freight for $1400; that on the 13th of August, a demand had been made on them for $2929 & 27 cents, in consequence of an averred total loss of the vessel; but that no part had been paid, as the sum insured was held subject to any lien

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which the respondents may have from having insured cargo in said schooner, to the amount of $3900.

The defendants have become indebted to the garnishees, by having received the amount which the property insured sold for at the port where the voyage was broken up. Whether they have a right to retain this sum as against the attaching creditor, is the only question in the cause.

It is contended they have not: first, because they did not accept the abandonment, and are yet contesting the claim of the assured, for which they now insist they have a right to retain the moneys attached: and second, because they owed the money at the time the attachment was levied, and no subsequent act of the defendants, by which they became indebted to the garnishee, can affect the rights of the attaching creditor.

It appears, from the case agreed on, that the abandonment was made on the 13th August, 1825. On the 20th of the same month, the attachment issued by the plaintiff, was levied on the sum in the plaintiff's hands due to the defendants. At what time Banks & Hendricks received the proceeds of the sales of the cargo

of the schooner Samuel Smith, is not conclusively shewn, either by the case stated, or by any evidence appearing on record.

As to the objection to the garnishees holding this money in their hands, because they did not accept the abandonment, and are yet contesting the claim of the insured, it is removed by the decision just made in this tribunal, which declares that abandonment to have been rightfully made, and the garnishees in consequence responsible. There is no principle better settled in maritime law, than that an abandonment rightfully made, reverts back to the time of the loss, and renders the insurer thenceforward the proprietor of the thing insured; and, whether the legality or correctness of this abandonment be ascertained by his acceptance of it, or by a decision of a court of justice, in opposition to his wishes, the result is the same. *Phillips on Ins.* 459.

But it is contended the insurers have no right to retain the money, because they were debtors to the defendants by the abandonment, and that the latter having since received money from them, cannot affect the right of the seizing creditor. In support of this position, the 2212 article of the civil code is relied on,

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which declares "that compensation cannot take place to the prejudice of the rights acquired by a third person; therefore, he, who, being a debtor, is become a creditor since the attachment made by a third person in his hands, cannot, in prejudice to the person seizing, oppose compensation." Whether this provision could apply to a case such as that before the court, where the receipt of the money after the attachment, was in virtue of an authority conferred before, we need not say, as the weight of evidence shews that the money was in fact received by the defendant previous to the time the seizure was made in the hands of the garnishees, so that they can properly offer it in compensation of the debt due by them.

The amount due on the two policies is 3822 dollars. From which must be deducted 2488 dollars, received by Banks and Hendricks.—This will leave a balance of 1334 dollars, from which again must be taken the proceeds of the wreck, 206 dollars 73 cents, and 254 dollars, for which Zacharie has a lien; and the balance will be 874 dollars and 27 cents. If the captain is entitled to any commission under the circumstances of the case, which

we doubt, it must be in a suit where he is a party.

It is therefore ordered, adjudged, and decreed that the judgment of the parish court be annulled, avoided and reversed: And it is further ordered, adjudged, and decreed, that the plaintiff do receive from the garnishee 874 dollars and 27 cents; the costs of the appeal to be paid by the appellees.

Eustis for the plaintiff, *Cuvillier* for the defendants.

VOLANT vs. *LAMBERT.*

The article in the constitution of the U. S. relative to fugitive slaves, does not apply to a case where a right of property is claimed in them by a citizen of the state where he is found.

Whether the vendor of a slave in this state, warrants a good title according to the laws of another state into which the slave is

APPEAL from the court of the first district

PORTER, J. delivered the opinion of the court. The petitioner states, that in the year 1820, he purchased a negro boy named Robert, from Julie Lambert; that in the year 1821, while he was in peacable possession of this slave, he was suddenly and clandestinely taken from him and carried into the state of Mississippi; that he has there been found in the possession of one Richard Terrill, who refuses to give him up, and that the petitioner has been obliged to commence suit for him.

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removed? *quere.*

Warranty of title in a slave is not limited to title with possession, but extends to cases where possession is lost, and the vendee is compelled to bring suit for him.

The petition concludes with a prayer, that the defendant may be notified to go and defend the suit in the state of Mississippi, and that in case the plaintiff should fail in the same, that she be condemned to pay the price she received for the slave, viz: $732, the costs of the suit, those of the present action, and all such other damages as may be suffered by the petitioner.

The defendant pleaded, that the disturbance complained of, was not yet such a one as the warranty in her act of sale made her responsible for. But that to guard against the consequence of a judgment in the state of Mississippi against her vendee, by which she might become liable, she prayed that Peter K. Wagner, from whom she purchased, might be cited to answer this action, and condemned to pay the petitioners the amount of any loss they might sustain by the eviction of said slave.

Before any proceeding was taken against Wagner on this demand in warranty, the cause was tried in the court, and judgment rendered against the defendant for the sum of $732, with interest from judicial demand, and $24 90 cents, the costs of the suit against the plaintiff in the state of Mississippi.

Subsequent to this decree, the defendant took a judgment by default against Wagner, which, on his motion, was set aside, and an answer filed by him, in which, after a general denial, he pleaded, that he purchased the slave in question from H. H. Gurley, for the price of —— dollars, and prayed, that said Gurley might be cited in warranty, and in case the defendant recovered of this respondent, that he should have judgment against his vendor for the purchase money, with damages and costs.

In a supplementary answer, he stated that he had committed an error in alleging that he purchased from Gurley, that on the contrary, his vendor was one Jasper Lynch, whom he prayed might be cited, and against whom judgment might be rendered in case the defendant recovered from him.

Lynch appeared and answered, that he had bought from Gurley, whom he required to be called in warranty, to defend the right and title to the slave.

Gurley pleaded:

That Volant, the plaintiff, could not recover from Lambert, nor Lynch from the defendant, because he only warranted the slave against legal demands, when it appears by the

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allegations in the petition, that the slave was surreptiously taken from Volant's possession and carried out of the state:

That he bound himself to assure a good and legal title to the slave, and that he is prepared to do so, should a suit be brought against a proper person, but that he was not bound to defend the suit against Terrill.

That the petitioner lost the slave by his own neglect, and not for want of title; that if the property sold was feloniously taken out of his possession, he should have proceeded by a criminal prosecution, and have had the property brought back within this state.

And that he bought the slave from one Sarah Mason, now deceased, whose heirs he prayed might be cited in warranty, and be condemned to pay him whatever sum Lynch might recover.

The court below decreed, that the defendants should recover from Wagner the sum of $500, being the price paid by her for the slave; that Wagner should have judgment against Lynch for $800, being the amount the former paid to the latter, and that Gurley should pay Lynch the same sum, with costs. From this judgment Gurley has appealed.

In this court he has alleged several errors in it

1st. That judgment has been rendered against him for 800 dollars, when it appears he sold the slave to Lynch for 500 dollars. In this position he is certainly correct, and should we find on examining the other points in the case, that he is at all liable: this error must be corrected. *Vol.* 2, 466.

2d. That the sale from Wagner to the defandant does not appear on the record; that the judgment against him is erroneous; and that there is no evidence to connect the sale made by the appellant, with the slave which was recovered by Terrill in the state of Mississippi.

Wagner, if he had appealed, might have complained of the correctness of the judgment rendered against him. The appellant has nothing to do with the defect in the proof, except as presenting the case without evidence to shew, that the slave he sold, is the same of which the defendant was evicted. We think, however, the record exhibits sufficient proof of that fact under the pleadings. Lynch, who sold to Wagner, does not deny it; and the appellant himself does not put it in issue.

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The appellant's next position is, that the last vendee, who was plaintiff in the suit in Mississippi, lost the slave by his own neglect; that he should have reclaimed him as a fugitive, or as having been stolen.

There is no evidence to shew the slave was stolen, or that Terrill got possession of him feloniously. But there is abundant proof to the contrary, in the judgment rendered by a court of competent jurisdiction, declaring the property to be in his possession. The article in the constitution of the United States does not apply to a case where the citizens of another state, whose laws recognize slavery, set up a title to a slave found within its limits.

The only question in the cause of any importance, is in relation to the effect of the judgment rendered in the state of Mississippi. The appellant contends he only warranted a good title, according to the laws of this state, and that the adjudication under the laws of another country does not falsify the warranty. If it were shewn in evidence, that by the laws of Mississippi, a different rule prevailed there, in respect to the right and title to property of this kind, from that which governs it here, and that a title which had originated in Louisiana, was

declared bad by those laws, when it would have been good in this state; this question might be one of very serious consideration, at least it would be so in the judgment of the member of the court who now delivers its opinion.—But in the present case that is not shewn, and even if it were, we are bound to presume and believe, that the district court of the United States did not apply those laws to this case improperly. If the facts shewed Terrill's right to the slave to have been acquired in the state of Mississippi, anterior to any title having vested here, then the court did right to decide by these laws, for a court of Louisiana would have done the same thing. If, on the contrary, it was derived from purchase, gift, or descent, in this state, then, we presume, the court decided it by our laws, and, as it was a competent tribunal, its decision is conclusive, unless the vendor can shew that had he received notice of it, he could have given facts in evidence, which would have required a different judgment. That evidence has not been offered: and as to the objection that the vendee should have brought a possessory action, we do not know the laws of that state recognised or permitted such a proceeding; and if it did, we

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are of opinion the warranty of title to a slave is not limited to title with possession; but is a warranty against all mankind, whether they are plaintiffs, or defendants. Again: every stipulation of the kind must be understood in relation to the subject matter in reference to which it is taken. Sellers of slaves know that they are liable to abscond, and that they may run into a state whose citizens may set up a title to them, and where, of course, the suits to recover them must be according to the modes of proceeding which the laws of that state sanction.

There is no error, therefore, in the judgment of the court below, except so far as it relates to the sum which the appellant is condemned to pay, and in not giving judgment against his vendors.

It is therefore ordered, adjudged and decreed, that the judgment of the district court as between Lynch and Gurley be annulled, avoided and reversed; that the said Lynch do recover of the appellant the sum of five hundred and eighty dollars, with costs of the court below; and that Gurley do recover of the heirs of Sarah Moore, cited in warranty, the sum

of five hundred dollars, with costs of the court of the first instance; those of appeal to be paid by Lynch the appellee. Eastern Dis. March, 1828.

Mercier for the plaintiff, *Canon* for the defendant.

BAUNE vs. *THOMASSIN.*

An action of slander cannot be commenced by process of attachment.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiff complains that the defendant, intending to deprive him of his good fame, made use of several opprobious expressions towards him, struck him with a cane, and otherwise abused and injured him. Reparation was sought by an action of attachment, the defendant having removed out of the state. The plaintiff had a verdict and judgment, and the defendant appealed.

The appellant's counsel urges that the court erred in discharging a rule granted against the plaintiff, to shew cause why the suit should not be dismissed, as the law does not authorise process of attachment in a case like the present.

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In the case of *Cross* vs. *Richardson*, *vol.* 2, 323, we held that, by the act of 1817, some kinds of damages are to be excluded from the operation which allows process of attachment; for it does not extend it to *all* cases of damages absolutely, but restricts it to damages *ascertained and specific*. We then sustained a suit by attachment in a case in which the defendant, having been entrusted with the management of the plaintiff's store, had wasted the money he received, and sold a quantity of goods which he failed to account for: because there the plaintiff could well ascertain the amount of the damages he was entitled to, inasmuch as it did not depend on his opinion of the wrongs inflicted on his *feelings*, reputation, or person. We are not dissatisfied with the opinion there expressed. Some cases of damages are certainly excluded. The exclusion does not appear to us too broad, and it is necessary to give effect to the words of the legislator.

According to this rule, we do not consider the present as a case to which relief is extended by the process of attachment. We think the court below ought to have dismissed the plaintiff's suit.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed,—and the plaintiff's petition be dismissed with costs in both courts.

Canon for the plaintiff, *Seghers* for the defendant.

BOWEN vs. *VIEL.*

APPEAL from the court of the fourth district.

When the consideration of a note to bearer and the right of the holder are put at issue, he must shew he came by it *bona fide*.

PORTER. J. delivered the opinion of the court. This action is brought on a note alleged to have been executed by the testator of the defendant in his life time, in favor of one Jacob Petit, *or bearer*, for fifteen hundred dollars, and payable twelve months after date.

The answer denies the execution of the note; avers that tho plaintiff holds it fraudulently, and in bad faith, and gave no value for the same; that if the signature to the note should be that of Goyer, it was obta ined fraudulently, knavishly, and without consideration.

The case originated in the court of probates, where judgment was given for the plaintiff.—From that tribunal an appeal was taken to the

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district court, where the issue joined, was tried by a jury, who found for the defendant. The plaintiff was unsuccessful in an attempt to obtain a new trial, and appealed.

The evidence, in our opinion, does very fully support the verdict of the jury, and shews the signature of the deceased to have been obtained by the grossest fraud. There is no proof, indeed, the plaintiff participated in the transaction, though the evidence shews that he is now willing to profit by it, without any other interest in the transaction but that which arises *lucrum captando.* The note was payable to bearer, and, as both the consideration on which it was given, and the right and title of the petitioner, were put at issue by the answer, it was his duty to prove he came by it *bona fide*, and for a good consideration. This case presents one of the exceptions to the general rule, enumerated in the case of *Bank* vs. *Eastin, vol.* 2, 292; See also, 1 *Camp.* 100; 3 *Burrows*, 1516, 1517; 2 *Show.* 235; *Taunton* 114; *Chitty on bills*, 1821, 89.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Eustis for the plaintiff, *Christy* for the defendant.

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GLASGOW vs. *STEVENSON*.

APPEAL from the court of the first district.

A plaintiff, from whom the delivery of a bill is drawn by an interrogatory, may prove its loss by the answers admitting the delivery.

Interest cannot be allowed on a contract made in Ireland on evidence, that it is customary, without shewing that it is authorized by law.

MATTHEWS, J. delivered the opinion of the court. This is an action on an open account, to recover the value of goods alleged to have been sold to the defendant in the year 1817, whilst both parties resided in Ireland, from whence the debtor absented himself soon after the purchase.

The answer to the petition contains a general denial and plea of prescription; and in a supplement, interrogatories are put to the plaintiff, in relation to an acceptance or note of the defendant for the amount now claimed from him on open account. These interrogatories were answered by acknowledging the existence of the bill of exchange and acceptance, which the respondent declares to be lost, and that it has never been paid, &c. After the return of the answers, the plaintiff moved the district court for, and obtained leave to, amend his petition, by alleging the existence and loss of the bill of exchange which had been accep-

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ted in his favor by the defendant, and that it had never been paid. On these pleadings, the cause went to trial in the court below, where judgment was rendered in favor of the plaintiff, from which the defendant appealed.

The facts of the case shew clearly, that goods were purchased by the defendant from the plaintiff, to the amount claimed by the latter, and that the former had accepted a bill of exchange drawn on him for the price of said goods. The discovery of the existence of this negotiable instrument, by which the appellant is bound, ought to destroy, or at least, suspend, the plaintiff's right to recover on the original contract of sale, unless the bill of exchange be satisfactorily accounted for; and in order to effect this purpose, the amendment to the petition, as above stated, was permitted by the court below, on a construction of the 419th article of our code of practice, which authorises amendments after issue joined, when they *do not* alter the substance of the demand, &c.

There are many decisions of this court which fully establish the principle, that a debtor, by giving his note for money owing by him, on open account, or other contracts, does not novate the original debt; and when the

written evidence is lost, the creditor may recover on proof of the original contract or implied promise. A suggestion, by way of amendment to an original petition, of the loss of the written evidence, it is believed, would not so alter the substance of the primary demand, as to exclude a plaintiff from the benefit or privilege accorded by the article of the code above cited.

In the present case a question of fact occurs in relation to the proof of loss. The only evidence to support it, is the testimony of the plaintiff, given on interrogatories put by the defendant. The object of these interrogatories seems to have been to establish the existence of a bill of exchange, accepted by the appellant. The answers acknowledge its existence, and proceed farther by stating its loss. By this mode of proceeding, adopted on the part of the defendant, he compelled the plaintiff to disclose facts injurious to the pursuit which he had commenced for the recovery ot the price of his goods on the original contract of sale; and being thus made competent to prove the existence of the written promise to pay, we can discover no good reassn why he should not be allowed to prove the loss also.—

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His situation is analagous to that of a defendant, who is called on to acknowledge the existence of a debt, which he may also declare that he has paid.

An objection is raised to the plaintiff's right to recover, arising out of the situation in which the bill appears to have been placed prior to its loss, by the endorsement of the payee, as exhibited on the copy annexed to the protest which appears on evidence. As the suit is founded on the original contract, and not on the bill of exchange, we are of opinion that the cases cited in support of this objection, do not apply, and that it is not well founded in reason or law.

The court below gave interest on the principal demanded, assuming from the evidence, that the *lex loci contractus* authorised it; and security was not required from the plaintiff to protect the defendant against the effects of his acceptance, should it ever re-appear. In both these respects, we think the judgment of the district court to be erroneous.

The only evidence on the record with regard to interest is the testimony of one witness, who states, that it is customary among merchants in Ireland to charge interest on accounts

at a certain rate. Now, we find the same thing practised by our merchants, but it is not authorised by law, and payment thereof cannot be enforced.

As to the prescription relied on by the appellant, it is clearly not supported by our laws, which, in relation to this part of his defence, must govern.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellee do recover from the defendant and appellant, three hundred and sixty-nine dollars and twenty three cents, with the costs of the court below; that the appellee pay the costs of this appeal; and that he shall not be permitted to take out execution on this judgment, until he shall have given security to the satisfaction of the district court to secure the defendant, harmless, from all injury or loss which might hereafter occur to him, in consequence of his acceptance of the bill of exchange, which seems to have been drawn on him for the amount of the account now sued on.

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Watts and *Lobdell* for the plaintiff, *Preston* for the defendant

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O'CONNER vs. *BERNARD.*

APPEAL from the court of the third district.

The jury are not bound to say a debt is paid because a witness swears he thinks it is. Interest must now be allowed on a protested note, from the day of protest. Where an attorney at law receives notes from a debtor, against whom he has claims for collection as collateral security with a promise to sue on them, he acts as agent of the debtor in the collection.

PORTER, J. delivered the opinion of the court. This is an action against the partner of a commercial firm, for the amount of a note executed in the name of the partnership. The defence set up in the answer is a debt due by the plaintiffs for goods sold, and an allegation, that notes to the amount of $3276 47 cents were placed in the hands of one Colt, an attorney at law, and agent of the plaintiff, who was authorised to receive them, and that they have never been accounted for or returned.

The cause was tried by a jury, who found a verdict against the defendant for $450. The plaintiff appealed, and the defendant, in this court, has assigned errors in the judgment, which he prays to be relieved against.

The principal matter in dispute between the parties, grows out of the delivery of the notes and accounts to Colt. The appellant insists that she was not responsible for the collection of these papers, or the fidelity of the agent to

whom they were entrusted. The defendant contends, that Colt, duly authorised by the plaintiff, received the notes, that there was latches in not collecting them, by reason of which, no recovery can be had on the note they were given to discharge; that large sums of moneys have been collected on them, which more than compensate the note sued on, and that, at all events, the plaintiff cannot have judgment against him, without, at the same time, being decreed to deliver up the notes which her agent received as collateral security.

Colt was an attorney at law. It is also proved that he was agent for the plaintiff, in collecting moneys for her, and paying debts. The note on which the suit is brought, was in his hands for collection. The receipt he gave for the notes and accounts delivered to him by the defendant, is in the following words: "Received of Messrs. Crawford & Bernard, by the hands of Joseph Bernard, the above mentioned notes, in amount $3276 47 cts. as collateral security on two endorsements—one of Jas. O'Conner for $800; one of James Flower for $1000, which, when collected, will go to discharge said endorsees; the balance, a debt due

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Wilkins & Linton, of about $5000; the notes in the hands of Woodruff are to be received. (Signed) J. D. Colt, acting for James O'Conner, James Flower, and Wilkins & Linton."

This case, with the exception of part of the money having been collected, presents almost the same features with that of Benson *vs.* Shipp, reported *vol.* 5, *n. s.* The attorney was the agent of both parties: of the plaintiff, to collect the debt due by the defendant, and to receive collateral security; of the defendant, to collect the debt so assigned, and pay over the moneys to those, for whose use they were placed in his hands. There is nothing proved in evidence, which shews the plaintiff enlarged the stipulation entered into by Colt, or, that, in any respect, changes the responsibility created by the terms of the receipt. The defendant must, therefore, look to Colt, or his representatives, for the notes placed in his hands. *Vol.* 5, 154.

But, for the money collected by Colt, we think the jury did right to allow a credit. By the terms of Colt's agreement with the defendant, to which we think there is satisfactory evidence of the plaintiff's assent: *the money when collected was to go in discharge of her*

claim. As soon, therefore, as it came into the agent's hands, its effect in discharging the debt cannot be distinguished from a payment made in money to the attorney bythe debtor.

The defendant complains there is an error in the verdict, in not allowing credit for all the moneys received on account of the notes. The draft of the plaintiff, and the sum paid by Bradford, are positively proved. The witness who deposed as to the collection of Guilbry, only swears *he thinks* it was paid. As the witness could not be certain of it, we do not see the jury can be considered in error for not allowing it in compensation.

But there is error in the verdict in not granting interest from the time the note fell due. It was protested; and by the act of 1821, bills of exchange and promissory notes carry legal interest from the day they are regularly protested for non-payment. *Acts*, 1821, 44.

The interest on the balance due on the note from the time it fell due, up to this time, is $113 75 cents, which, added to $450, makes the whole amount to which the plaintiff is entitled, $563 75 cents.

It is therefore ordered, adjudged, and decreed that the judgment of the parish court be

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annulled, avoided and reversed: And it is further ordered, adjudged, and decreed, that the plaintiff do recover of the defendant, the sum of five hundred and sixty-three dollars and seventy-five cents, with costs in both courts.

THOMPSON vs. *LINTON & AL.*

APPEAL from the court of the first district.

If, in a contract, certain advantages be stipulated in favor of a third person, in consideration of services to be by him performed, the parties may alter their minds, provided he be not injured in regard to services prior to the change.

MATHEWS J. delivered the opinion of the court. This suit is brought against certain pilots, resident at the Balize, on a contract or agreement entered into amongst themselves, in relation to the employment of boats in their business of piloting; by which they stipulated that the boats or vessels employed should draw 2-5ths of all money earned, and 3-5ths the balance was to be shared by them the pilots. In this contract they agree to make the plaintiff their agent, to collect debts for them, allowing a commission of 5 per cent. to him on collections, 2 1-2 per cent. for money advanced, and 1 1-2 for all purchases made in produce for the boats, which were to be used

as above stated. The plaintiff alleges that Mr. Linton and one Holman, purchased a schooner called the Eliza, in partnership, which was for some time used in the piloting business, but his partners had failed to account with him, or pay any of the profits which were derived from the use of the vessel, and prayed a dissolution of the partnership and final settlement of accounts. He afterwards dismissed his suit so far as it related to Hollman.

In this mixed state of a suit, against the pilots to compel them to comply with the engagements they had entered into, (with each other,) for the benefit of the plaintiff, and also to compel Linton to pay over to him as part owner of the boat, his share of the 2-5ths earned and to dissolve the partnership, the cause was submitted to a jury in the court below, who found a verdict for the plaintiff for $1500; an appeal was taken and the judgment of the district court was reversed, on account of the plaintiff having blended two distinct causes of action, against persons owing on different claims. The case was remanded for a new trial and previous to entering thereon, the plaintiff discontinued so much of his petition, as prays for a dissolution of the partnership

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and sale of the schooner therein mentioned, and the cause seems to have been proceeded in exclusively in relation to his claim for damages occasioned by a breach of the contract made and entered into between the pilots themselves, in which they stipulated to employ him as their agent; and to recover his third part of the 2-5ths which was earned by the Eliza, as being owner to that extent: also the amount advanced to and paid for the benefit of the defendants.

The plaintiff was not a party directly to the contract under which he claims the advantages which might have resulted from his services in collecting debts, advancing money and purchasing provisions. It was a stipulation made in his favor in consideration of services to have been by him performed; but in its origin wholly voluntary on the part of the defendants, who had a right to change their will in this respect, so as not to injure the person employed by them, in any thing which had been done by him previous to such change.

As a company, they are answerable to him for his proportion of the money earned by the use of the schooner Eliza, being 1-3d of 2-5ths, and also for money advanced to them and articles furnished, &c.

In the last trial in the district court, the cause was submitted to a jury, who found a verdict for the defendants, on which judgment was rendered and the plaintiff appealed.

The decision of the case depends exclusively on questions of fact, as supported by the evidence. The appellant relies principally on the testimony, drawn from Brower, one of the defendants, by interrogatories, to shew that the jury erred. In support of the verdict the appellees rely on that of Copping, a witness on their part. This witness swears that he paid to the plaintiff $154,50; and that the sum thus paid, was in full for his share of the profits in the schooner Eliza, which had accrued up to the 7th of September, 1825.

Brower's testimony does not establish any certain amount, as owing by the defendants to the plaintiff; it is wholly indefinite both as to what may be due on account of the gains of the Eliza, and in consequence of purchases and advances made for the use of the appellees.

The record furnishes no evidence by which it can be clearly ascertained that the jury have erred in their conclusion on the facts of the case.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Pierce for the plaintiff, *Preston* for the defendants.

PEET & AL. vs. MORGAN.

APPEAL from the court of the first district.

A legislative declaration, that if the intervening party does not give security, and the sheriff proceeds to sell, the latter shall be responsible for damages, does not repeal all other parts of the law under which he was so before.

PORTER, J. delivered the opinion of the court. This case has been already before the court, and by a judgment of this tribunal of March term, 1827, it was remanded for a new trial. Since its return to the district court the intervener discontinued by leave of the court, and the case was tried between the original parties, there was judgment against the defendant, and he appealed.

No delivery is necessary where the thing sold is already in the vendee's possession, tho' *in autre droit*.

It is an action against the appellant for having as sheriff, illegally and forcibly taken possession of a certain quantity of merchandize, of which the plaintiffs allege they are owners.

The defendant pleads that the trespass and injury complained of, results from a seizure made by him in his official capacity in virtue of a writ of attachment issued in a suit

wherein T. W. Pratt was plaintiff, and R. & B. W. Dewitt were defendants, and that he took the goods mentioned in the petition, by virtue of special instructions from Pratt, in consequence of which he is not liable to an action at the suit of the plaintiffs.

He further pleads that the goods were the property of the Dewitts, and that the sale to the plaintiff, if any such there was, was false, fraudulent, simulated, and collusive.

This last ground of defence was disposed of when the case was last before us. We there held, as we had repeatedly decided in other cases quite similar to this, that frauds and collusion could not be enquired into in an action arising on a seizure made by the sheriff, that if the sale was fraudulent, a suit should be brought to set it aside, and that the party could not before a judgment was rendered, annulling the contract, treat the transaction as null and void, and seize the property as belonging to the vendors.

We then also expressed our opinion, if not at great length, at least after much reflection, that the first ground of defence was untenable. The counsel for the appellant has again gone fully into the subject, but after the best conside-

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ration we can give the question, our conclusions must be the same as before. The whole strength of the argument rests on the provision in the code of practice in relation to the opposition of third persons, whose property is seized by the sheriff, and particularly the 400th article, which declares, that if the third person, who has intervened to prevent the sale, does not furnish security to have it enjoined, the sheriff may sell; but that if he does, he shall be personally responsible to the intervener for all damages which the sale may occasion. The conclusion we draw from this provision, is directly opposite to that contended f r by the appellant. He argues, because recourse is given in this instance, it is refused in all others; that this new provision is a repeal of our former law, by which the sheriff was responsible, if he seized property other than that of the defendant in execution. But we think, that on no sound principle of construction, can the affirmative provision be considered a repeal of a former law, to which it is not contrary, nor even different; for previous to the passage of the code of practice, a third person, whose property was seized, might have endeavoured to prevent the sale, and if the sheriff sold after

the interference, he would have been responsible. But the responsibility, after judicial notification, is not irreconcileable with the rights of the owner to claim damages, though he does not interfere. They both stood together before the code of practice, and the re-enacting one of them, does not repeal the other.—We have so often expressed our opinion in regard to the rules of construction applicable to repealing statutes, that it is deemed unnecessary to go into the subject at length. *Vol.* 1, 158; *ibid*, 73; *vol.* 3, 190 & 236.

The exception attempted to be made, because this provision is found in the code of practice, and not in an ordinary statute, is without any foundation, There is no repealing clause to it, except in relation to articles of the civil code to which it may be repugnant; no rule presented for its construction which places it on different grounds from other laws. *Act of* 1824, 178.

One of the points made by the appellee is, that the goods were delivered as a collateral security, and that there was no transfer of the property. The evidence, we think, shews that the securing of a debt due to the plaintiffs was the motive that induced the purchase; but the

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contract which intervened between them and their debtor, for the accomplishment of this object, was one of sale, and vested such a title to the goods in them, as prevented their seizure.

The cause was remanded to ascertain the date of the *sous seing prive* act, under which the plaintiffs claim. It appears by the evidence taken on the second trial, that it was executed the day prior to the seizure. The actual possession being in the plaintiffs, antecedent to, and at the time of the transfer, though not in their own right, did not prevent possession following the title. No further delivery was necessary. None could have been made, unless the vendor first took them out of the hands of the purchaser, and then gave them back again, which would have been a vain ceremony the law does not require.

The judgment of the court below is complained of, as giving the plaintiffs a larger sum than they are entitled to: on this point the opinion of the court is with the appellant. As the goods have been sold by consent of both parties, since the inception of the suit, and as the amount of the sale will cover the price the plaintiff was to pay, we think the officer who

acted in good faith, should not be responsible for more than the nett amount produced by the sale at auction.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant the sum of five thousand nine hundred and forty-three dollars and seventy-five cents, with costs in both courts.

Hennen for the plaintiffs, *Watts* for the defendant.

SABATIER & AL vs. *THEIR CREDITORS.*

Any legal evidence may be offered in support of the confessions of an insolvent, that he owes one of the creditors in the *concurso*.

APPEAL from the court of the parish and city of New-Orleans.

PORTER. J. delivered the opinion of the court. Brunetti the appellant, complains of the judgment rendered in the court below, which placed him on the tableau of distribution as a simple creditor—he contends that he is a privileged one.

The obligation of a contract is that which the law in force at the time of the contract obliges the parties to do or not to do.

The case presents two questions:

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1st. Whether he is a creditor to the amount claimed by him.

And 2d. Whether he has a privity which authorises him to be paid in preference to chirographary creditors.

A law passed after a contract which would exempt all the property of the obligor from the payment of the debt, would be unconstitutional.

It would be equally so, if a portion was placed out of the reach of execution, provided the portion left was not sufficient to satisfy the debt.

The privilege on contracts of deposit entered into before the promulgation of the Louisiana code, is not affected by its provisions.

I. As the judgment of the court below recognized the debt, and the other creditors who oppose the appellant have not prayed for any amendment to it, that question would seem settled. But in this court it has been argued, that, though they have no objection to recognise him as a simple creditor, because they have no interest in contesting his claim on that ground, they are deeply concerned in disputing his claim to be paid in preference to others; and that in exercising the right to contest his privilege, they can put him on the proof of every fact necessary to establish it, among which the first and most important is, that he should shew the existence of the debt claimed by him.

Perhaps they have: at all events, as our opinion accords with that of the lower court as to the justice and reality of the claim, we find it necessary to examine whether, under the state of the case, the question is open for examination. It is true, as contended for by the appellees, that on a contest between creditors

in *juicio de concurso*, the notes or obligations of the insolvent do not make, in themselves, proof of the debt apparently due to them.—They must be supported by other evidence. What that other evidence must be, as was said by this court in the case of *Menendos* vs. *Lorionda's Syndics*, no author that we have been able to consult distinctly and positively states. But as the books declare they do make evidence, when supported by other circumstances, (*otros adminiculos*) the conclusion come to in the case just stated, appears to us still to be the correct one, namely; any legal evidence which will convince the minds of a court and jury of the fairness and justness of the claim. The evidence furnished in the case before us leaves not a doubt on our minds that the money was deposited as the appellant alleges, and we shall, therefore, proceed to examine whether he has a privilege for its payment: 3 *Martin*, 705; 12 *ibid*, 157; *Febrero*, *p.* 2, *lib.* 3, *cap.* 3, *no.* 34.

II. This question is much more difficult than that just disposed of. At the time the money was placed in deposit, the provision of our old code regulated contracts of this description, and as, by them, no change was made in

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the ancient jurisprudence of the country, a privilege or right of preference existed on the irregular deposit. Since the contract was entered into, and before the failure of the insolvents, a change has been made in our law by which the privilege of the depositor is restrained to cases where the thing reclaimed is identically the same with that deposited: consequently, that arising from the irregular deposit, when the demand is not for the same thing, but for the same quantity of the thing placed in the hands of the depositary is established: *Civil Code*, 2934, 3189; 9 *Martin's Rep.* 470, *Durnford* vs. *Seghevs' Syndics.*

By which of these laws should the right of the appellant be decided is the point presented for decision. If the privilege accorded by the law at the time of the contract, make a part of the rights flowing from the agreement, then the claim of privilege must be allowed. If, on the contrary, it is nothing but one of the remedies given to enforce the agreement, the control of them was within the legislative power, and the preference being abolished, the claimant must be put on the tableau as a simple creditor.

The distinction between rights and remedies is a subject of frequent discussion in courts,

and the repeated contests they give rise to, is a sure proof how unsettled the doctrine is which governs them. The constitution of the United States prohibits any of the particular states from passing laws which will impair the obligation of a contract As the obligation here spoken of is the legal, and not the moral, obligation, it would seem to follow, that the obligation of a contract *is that which the law in force at the time the contract is made, obliges the parties to do or not to do.* If this be true, the right of each is, to obtain a performance of every obligation arising out of the agreement at the period it was entered into. *The remedy is the means given by law to carry this right into effect.* The question, then, in every case of this kind, is, what are the obligations of one of the parties, because the rights of the other are ever correspondent to, and coextensive with, the duty imposed on the person with whom he stipulated.

Now, in the ordinary case of a promise to pay a certain sum of money on a particular day, the obligation of the contract is, that the debtor shall discharge the debt at the period fixed, or, that in default thereof, his property shall be responsible to satisfy his engagement.

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We are aware that a few have contended, that there is no implied obligation to make the property liable in a contract of the kind just mentioned; but we apprehend such a ground is quite untenable. Indeed, we do not see how it can be maintained without reducing the obligation from a legal to a moral one, since a right without a legal remedy ceases to be a legal right. If, by the contract, the property of the debtor did not become responsible, and was not, as between creditor and debtor, to be placed out of legislative controul, there would be scarcely any thing left for the prohibition in the constitution of the United States to act on. It cannot be believed the framers of it intended to guard against the states passing laws, which might add to, or take from, the amount to be paid, and change the time of performance, and leave them a power which would enable them to say, the debtor should be enirely released, both in person and property, from his engagement.

In the case of *Sturges* vs. *Crowninshie'd* in the supreme court of the United States, it was admitted in argument, that all the present property of the debtor was responsible to the creditor; but it was urged that the obligation

did not go so far as to make future acquisitions subject to it. The court, however, said, that both present and future were, and to release the latter from liability impaired the obligation. In the case of *Green* vs. *Biddle*, they declared that any law introducing a deviation from the terms of the contract, by postponing or accelerating the period of performance, imposing conditions not expressed in the contract, or dispensing with those that were, violated its obligation: 4, *Wheaton* 122; 8, *Wheaton* 1.

We take it, therefore, as clear, that in the case put of an ordinary obligation to pay money, a law passed subsequent to the contract which would exempt all a man's property from the payment of the debt wonld be unconstitutional; and that it would be equally so if a par- of it was placed out of the reach of execution, provided, the portion left liable was not sufficient to satisfy the debt.

If it be true, then, that on the implied oblit gation of the property being liable for heengagements of the debtor, the legislature cannot deprive the creditor of recourse on it: it would seem still clearer, they cannot interfere with a special contract by which the debtor makes a part of his property liable in the first

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instance for it. Because, if the law sanctions at all such an agreement, the creditor acquires by the stipulation, a right to the thing, which no subsequent legislative act can take from him, without changing, or in case of insolvency, weakening, and, perhaps, entirely destroying, his claim. Such would be the consequence in the common case of a conventional mortgage. The mortgagee lends his money because the law allows him to take security for his debt by obtaining a special lien on some part of the borrower's property. The security makes as much a part of the mortgagor's obligation and the mortgagee's right, as the promise to pay the money does, and future laws can no more deprive him of the one than the other. If, instead of taking real recurity, he obtained personal, by getting another to join his debtor in the bond, it would not be pretended that a subsequent act of the legislature, by declaring that there should be no such contract, as that of security enforced in our law would discharge the co-obligor. And if the personal security could not be taken away, how can the real: they have both the same object; they are both permitted by the law; and they are both of equal importance to the creditor,

who has trusted to them as a means of assuring the re-payment of the money he lent on the faith of them.

In what respect the contract of deposit now before the court can be distinguished from that of mortgage in relation to the present question, we are unable to perceive; except, that in the former, the law gave a privilege to the depositor on all the property of the depositary, the moment the contract was made: in the latter, there required an express stipulation. But every principle that prevents legislative interference with the one forbids it with the other.

As to the argument, that creditors, subsequent to the repeal of the law, are not bound by the contracts made previously by their debtor, we understand it to be perfectly well established that they are bound by them. In many cases, the legislature have required, that acts which give a preference should be registered to make them have effect against third parties, but when this formality is not required, and the law declares the creditor shall have a privilege, it is as binding on others as on the debtor himself.

There have been some cases brought before the tribunals of France, which bear a

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close, if not a perfect analogy to that before the court, and they are more worthy of attention, because they were decided on general principles of law, without any special clause in the constitution of that country such as ours contains.

They arose on the 2161st article of the Napoleon code, which declares, that when the debtor has given a general mortgage on his present and future property, and the objects hypothecated amount to more than was necessary to secure the debt, the debtor has an action to reduce the mortgage to such portion of the property as will be sufficient to secure and satisfy the sum due.

By the laws of France previous to the adoption of the Napoleon Code, no such power was vested in the mortgagor, and soon after its passage, a question was presented to their tribunals, whether a mortgage given under the ancient law could be reduced under the new.—Two of the appellate tribunals to whom such a case was precented, decided in the negative: they held, that the right to make the whole of the property responsible existed by the original contract, and that the new law could not change it without giving to that law a retroactive effect.

Two other courts of equal dignity held they might, but their decisions have not escaped severe animadversion. However, the principles on which they decided, strongly support the conclusion we have come to in the case.—They considered, that so long as the law left enough of property hypothecated to secure the payment of the debt, it could, for public convenience, unlock the surplus from the lien imposed on it, and that, by such regulation, the right of the creditor was not touched; it was only a change made in the property on which it might be enforced: *Pothier's traite des Hypoth. vol.* 2, *ed.* 1809, *p.* 171 *&* 198; *Questions transitoires sur le Code Napoleon, vol* 2, *p.* 47 *to* 59.

The legislation of the 2118th article of the Code Napoleon, declares, that mortgages can be only given on immoveable property and their accessories. By another article of the same work, (529) rents of land were declared to be moveable. The effect of these provisions was to abolish the right which had existed under their former law, of taking mortgages *sur des rentes foncieres.*

At the time this change was made in their law, there existed a great number of mortga-

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ges, which, previously to the adoption of the Napoleon Code, had been given on debts of this kind. Questions, we perceive, have been raised, whether it was not necessary these mortgages should be registered pursuant to the new law, but not a doubt is expressed as to their validity: *Questions transitoires sur le Code Nap.* 68 *&* 73,

The question presented in this case renders it unnecessary to examine to what extent the legislative power to contract remedies may be carried. In many instances that power may impair the creditor's right. The terms of the courts may be placed at such a great interval of time, that before the creditor can obtain judgment, the debtor has wasted all his property. Execution may be required to be levied on some description of goods before others can be seized, and the collection of the debt in this way delayed. The power of arrest on mesne process may be abolished, as may be that of imprisonment after judgment. But these are inconveniences incidental to the authority necessarily vested in the legislature to regulate the proceedings of court, and its constitutionality is undoubted. It is sufficient, in the present case, to say, that in the exercise of this power,

they cannot turn a legal obligation into a moral one, nor change a privileged into a chirographary creditor.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed,—that the appellant be placed on the tableau of distril ution as a privileged creditor, according to the rank he is entitled to, in reference to others holding privilege on the estate: and it is further ordered, that the appellee pay the costs of this appeal.

Workman for the plaintiff, *Mazureau* for the defendant.

PLAUCHE & AL. vs. *GRAVIER & AL.*

A mortgaged square may be sold in separate lots.

A defendant who did not appeal, cannot be heard in the court *ad quam.*

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. Gravier, sued for a balance due on a notarial act of mortgage, with a view to ulterior proceedings against the premises in the hands of third possessors, the other defendants pleaded, that the plaintiff had made a compromise with the former, and his interests had been sacrificed by a sale of the mortgaged pre-

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mises, a whole square in lots. The plaintiffs had judgment, and he appealed.

His counsel urges, that a mortgage is indivisible, and bears on each and every part of the premises, and the plaintiff had no right to sell a square in separate lots.

It is true that a mortgage bears on each and every part of the property mortgaged. Thus a mortgage of a gang of slaves bears on each and every head, and a mortgage of a square bears on each and every lot; but no law requires that either the gang or the square be sold *en masse*.

The appellant cannot avail himself of, neither can he be injured by, the compromise of the appellees with his co-defendants.

His counsel here prayed to be heard, in behalf of the other defendants; but as they did not appeal, we have deemed it improper to permit it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Denis for the plaintiff, *Young* for the defendant.

CHANDLER & AL. GARNIER.

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Lenders on bottomry & *respondentia* are liable to contribution on general average.

APPEAL from the court of the first district.

MATHEWS J. delivered the opinion of the court. This suit is brought by the owners of of a brig called the Samuel, to recover from the defendant an amount which they allege he is liable to pay on general average, in consequence of sacrifices made for the preservation of the vessel and cargo. He contends, in his answer, that the adjustment of average was incorrectly made, in two respects: 1st, by enlarging the sacrifice or loss by the addition of pilotage and steam boat hire for towing the vessel from the Balize to N. Orleans. 2d, In exempting from contribution, the freight, to the amount of a bottomry bond, by which the brig and freight were hypothecated to certain lenders on marine interest, in the city of Bordeaux and kingdom of France. A legal tender is made of the sum which the defendant acknowledges to be due; but is something less than tha which was adjudged to the plaintiffs by the court below. We find on the record what is there called, an "amended statement of average," in which the sum of $300, for the hire of the steam boat, and $8 charged by the pi-

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lot for detention, are deducted from the amount sacrificed or necessarily lost, according to the adjustment on which the action is founded. Both parties were dissatisfied with the judgment of the district court, and both appealed.

The case presents two questions—one of fact—the other of law. That of fact arises out of the evidence which relates to the necessity of having the brig towed from the Balize to New-Orleans, as a means of preservation from imminent danger of destruction of vessel and cargo. From the testimony of the cause, the court below seems to have been of opinion, that no absolute necessity of this kind did really exist, and consequently, the expense incurred should be borne by the owners, as is customary in ordinary occurrences. With regard to this question in the case, after strict examination of the whole evidence, we do not find the facts therein disclosed, so conclusive in their nature, as to cause us to make deductions different from those which seem to have governed the judge *a quo* in rendering his judgment.

If the case were to be governed by the general law of merchants, unincumbered by de-

cisions of the tribunals of England, apparently made in pursuance of the law in that country on the subject of bottomry and respondentia, and freed from some *obiter dicta*, to be found in the decisions of causes made by the courts of the United States, in relation to insurance, the legal question which it presents would be of easy solution: *Vide M. Insur. Bac.* 6; *Park do. c.* 21; *Pell. do. p.* 302; 2 *John. Cases, p.* 252.

It may be laid down as a general rule, recognized and established by all authors on the subject of commerce, that ship, freight and cargo are bound to contribute, in gross, or general average. In opposition to this general principle, an exception is claimed by the plaintiffs, as being supported by English and American decisions, which establish the doctrine, that lenders on bottomry and *respondentia* are free from contribution in case of general average. Now, if this doctrine be correct in any point of view, (which, in our opinion, can hardly be admitted) it can only be justly invoked for the protection of lenders; which can never be necessary, unles the value of the vessel and freight hypothecated, should prove inadequate to pay the money borrowed, after deducting the rate-

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able contribution to be made, from said balance.

According to the evidence in the present case, it is clear that more than sufficient to pay off the bond would remain, of the value of the brig and freight, after deducting the amount which they are bound to contribute on gross average; this contribution should, therefore, be first made, and the bottomry bond be discharged from the remainder.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged, and decreed, that the plaintiffs recover from the defendant the sum of eighty-one dollars and thirty-three cents, and that the defendant pay all costs which accrued in the prosecution of the suit up to the time of the tender made; the plaintiffs to pay all subsequent costs, as well as those of appeal.

Pierce for the plaintiff, *Strawbridge* for the defendant.

MILLAUDON vs. SMITH.

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The copy of a plan certified to have been taken from the original, by a surveyor not in possession of the original, is not legal evidence. The court will remand a case for new evidence when they think the justice of the case requires it.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The question in this case is whether the plaintiff's house and lot are entitled to a right of view or prospect over the space of ground between the premises and the river Mississippi. The evidence of this right, the plaintiff contends, is on a plan of the town of New Valencia, on the Mississippi, near the mouth of Bayou Sarah. The plaintiff had given notice to the defendant, to produce the original plan, which was alleged to be in the hands of the latter. The original not being produced, the plaintiff introduced a copy, certified by the surveyor to be taken from the original plan. The judge *a quo* admitted it in evidence, although the defendant's counsel objected that the surveyor was not the keeper of the original; that the authenticity of the plan copied from did not appear. For these reasons we think the copy offered, affords no legal evidence and as it it probable that justice cannot be done in this court without legal evidence in this respect, we are of opinion the case should be remanded.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded for a new trial; and it is ordered that the plaintiff pay costs in this case.

Grymes for the plaintiff, *Watts* for the defendant.

TALMAGE & AL. vs. PATTERSON.

APPEAL from the court of the parish and city of New-Orleans.

An administrator does not become personally liable, on his letter announcing the sale of the property of the estate, and the debt would be paid as soon as the money was collected—even on proof of such collection.

MARTIN, J. delivered the opinion of the court. The plaintiffs sued the defendant in his individual character, for a debt due to them by the estate of Wm. Dame, deceased, of whom the defendant is administrator, on the ground that he has received funds of the said estate, sufficient to pay said debt, and that he wrote to the plaintiffs that their debtor was dead, that he (the defendant,) had been appointed administrator of the estate, that he had sold the property at twelve months, and that they should have their money *as it is collected;* and the defendant neglected to answer the plaintiffs interrogatory, "Whether he had not received

sufficient funds, belonging to the estate, to pay the plaintiffs claim."

The parish judge gave judgment for the defendant, being of opinion that the plaintiffs had not shown a sufficient cause of action.

The defendant was appointed administrator to the estate of the plaintiff's debtor in the territory of Arkansas, and wrote the letter *produced* against him, to inform the plaintiffs of this circumstance and announcing the sale of the property on a credit, and that the debt would be paid as soon as funds were collected.

In doing so the defendant did his duty as administrator; and we think the parish judge acted correctly in declaring that he (the defendant) had not been made himself *personally* responsible—neither does his admission (resulting from the failure to answer the plaintiff's interrogatory) make him so—for, it at most shews that assets came to his hands—but this does not make him liable in his individual capacity, nor does his letter which is evidently written in his capacity of administrator.—*Chitty on Contracts*, 84.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed with costs.

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Christy & Cenas for the plaintiffs, *Nixon* for defendant.

ORY vs. WINTER.

APPEAL from the court of the second district.

MATTHEWS, J. delivered the opinion of the court. This is the third time that this case has been before the appellate court. Once on a former appeal, a second on a rehearing, in consequence of which the cause was remanded to be tried *de novo*; and now by an appeal from the judgment rendered on the new trial.

The suit is brought by an indorsee of a promissory note, executed in the state of Mississippi, against the maker. The defendant pleads error and want of consideration for a large part of the whole amount for which the promise was made.

All the important principles of law which relate to the matters in dispute between the parties, were settled by a judgment of this court, pronounced on the last hearing: we have re-examined them in the present instance and believe that they have been correctly determined.—*Vol.* 4, 277.

The judgment of the district court from which the present appeal is taken, allowed the defendant the entire deduction which he claimed from the amount of the note sued on, and from this judgment the plaintiff appealed.

The decision of the case as now presented to this court, depends principally on matters of fact, and the evidence of the cause seems to support the conclusions of the judge *a quo*, with two or three slight exceptions. These relate to the calculation and allowance of interest at 10 per cent. per annum, on the amount of an account, which the defendant claims to have deducted from the note; an item of $111,16, which Gilbert the payee of the note undertook to collect from one Jones; and another account of $25,37. With regard to the interest calculated on the account, there is no evidence on the record to shew that by the laws of Mississippi, interest is allowed on open accounts. It is agreed that according to those laws, notes bear interest at the rate of 8 per cent per annum, after they become due. Mears' testimony, might induce a belief that Gilbert assented to the correctness of the charge of interest; but according to our laws, conventional interest is chargeable only when supported

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by an agreement in writing. In relation to the two sums which Gilbert undertook to collect, and pay over the amount; the breach of his contract has been passive only, and he is responsible from the time alone in which he may have been put in default, *Lou Code, art.* 1927: and it does not appear that he has yet been placed in that situation. The interest on the whole of the account as calculated, and the two last items of said account, must therefore be deducted from the sum allowed in favor of the defendant by the judgment of the court below.

Objections by the plaintiff, are found on the record to the testimony of all the witnesses Staunton, Mears and Gilbert. Those made to the testimony of the first, are clearly unfounded. And we deem it useless to enquire into the competency of the two last, because should they be rejected, there is still sufficient evidence to establish the error complained of by the defendant to the amount of his account current against Gilbert for the year 1821; which must be taken from the sum total of the note; and judgment rendered in favor of the plaintiff, for the balance, with interest at the rate of 8 per cent. from the time at which it became due.

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It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided and reversed: And it is further ordered, adjudged, and decreed, that the plaintiff and appellant do recover from the defendant and appellee, eleven hundred and forty-four dollars and 25 cents, with interest at the rate of 8 per cent. per annum, from the 1st day of April 1823, until paid; and that the appellee pay the costs of both courts.

Ripley & Conrad for the plaintiff, *Watts & Lobdell* for the defendant.

PARKER vs. *STARKWEATHER.*

APPEAL from the court of the first district.

Reconvention may be pleaded in a supplemental petition, when the defendant has set up a reconventional demand, superior in amount to the sum claimed in the petition.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiff claims from the defendant $850 for rent of a house and blacksmith's shop. The defendant pleads in compensation a debt, due to him from the former for work and labour performed in his trade as a blacksmith, to an amount exceeding the sum demanded by the plaintiff, and asks judgment for the surplus. To this plea of compensation and reconvention the plaintiff replied by dis-

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puting the claim of the defendant, and pleading other claims against him in compensation.

On the trial of the cause in the court below, the judge refused to suffer the plaintiff to give any evidence in support of his replication or plea in compensation, and to the opinion by which this evidence was rejected, the counsel for the appellant took a bill of exceptions; which presents the only question in the case.

The compensation pleaded by the defendant being followed by a claim for a surplus remaining after full discharge of the plaintiff's demand, must be considered as a suit in reconvention. It is true that reconvention is one mode of claiming the benefit of compensation, and peculiarly so when any connection exists between the opposing claims of plaintiff and defendant. But when the party reconvening, demands more than sufficient to compensate the claim against him, his plea partakes much of the nature of an original suit, to which payment might certainly be pleaded; and compensation is a species of payment *solutionis vicem obtinet.* This is strictly true in cases where the opposing claims are liquidated and certain. If they be of the same nature and not of difficult liquidation, compen-

sation as payment ought to be tolerated, and is authorised by law in defence.

The defendant relies on two principal grounds in support of the correctness of the opinion of the judge *a quo*, by which he rejected the evidence offered by the plaintiff on his plea of compensation. 1st. That our code of practice does not authorise replications.—2d. That the replication being a reconvention on the part of the plaintiff, against that pleaded by the defendant, it is not tolerated by law.

The 239th article of the code of practice provides that new facts alleged by a defendant in his answer, shall be considered as denied by the plaintiff, and therefore admits neither replication nor rejoinder. By the 377th article of the section which treats of demands in reconvention, a defendant may plead it either as an exception in his answer to the principal demand, or institute a distinct and separate demand, and the plaintiff is bound to answer.

Now in whatever form a defendant may choose to put his defence, if he demand judgment against the plaintiff for a surplus, in his plea of compensation and reconvention, it is no longer a simple exception; but beyond the extinction of the demand of the latter, it is the

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institution of a separate and distinct demand, to which the plaintiff is bound to answer, and cannot be rightfully prevented from using all legal means of defence, amongst which payment or compensation to the extent of payment alone may be used.

The doctrine on this subject carried thus far is in conformity with the ancient laws of the country, and does not conflict with the general rule that reconvention is not permitted; which rule itself suffers an exception, as explained by *Toulier vol. 7, page 495, art. 415. See, also, Febrero Bt. 2d, book 3, chap. 1, no. 256, same part, and book Chap. 2d, no. 212, and the Curia Phil. page 75, no. 8.* In the present case, the amount pleaded in compensation (to the defendant's demand in reconvention) is equally easy to be liquidated, as the account set forth by the reconvenor. The reason of the rule which seems so much to eschew the danger of infinity in reconvention, will, we think, be sufficiently satisfied, by limiting the respondent to compensation alone—rejecting all claim for surplus.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court

be avoided, reversed and annulled, and it is further ordered, adjudged, and decreed, that the cause be remanded to said court to be tried *de novo*, with instructions to the judge *a quo* to admit the plaintiff to prove the amount which he offers as compensation to the defendant's demand in reconvention. The appellee to pay the costs of appeal.

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Preston for plaintiff, *Hennen* for defendant.